SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 9693

SEELEY TUBE & BOX COMPANY, APPELLANT,

vs.

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY

APPENDIX TO BRIEF FOR APPELLANT AND PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Appendix to Brief for Appellant

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1 **Appendix**

Docket Entries

1945

Oct. 4. Complaint filed. Summons issued. Notice of Allocation filed (Newark).

Oct. 10. Summons returned—served on U. S. Atty. and Atty. General on 10/5/45. Served on John E. Manning, Collector, on 10/8/45 filed.

Nov. 27. Stipu-ation and Order extending time to answer to 3 Jan. 46 (Meaney) filed.

1946

Jan. 2. Stipulation and Order extending time to answer to 3 Feb. 46 (Meaney) filed.

Feb. 5. Stipulation and Order extending time to answer to 3 Mar. 46 filed (Meaney).

Mar. 11. Stipulation and Order extending time to answer to April 3, 46 filed (Mar. 8 '46 (Meaney).

Apr. 1. Stipulation and Order extending time to answer to May 3/46 filed (Meaney).

May 11. Answer filed.

1947

Feb. 18. Stipulation of Facts filed Feb. 17/47.

Feb. 20. Copy of notice of trial (Smith) on Mar. 18/47 filed.

Mar. 25. Trial without jury before Hon. Wm. F. Smith. Decision Reserved. Briefs to be filed.

2 *1948*

Mar. 4. Finding of Facts and Conclusions of Law and Judgment of no cause for action in favor of the defendant, John E. Manning as Collector of Internal Revenue and against the plaintiff, Seeley Tube & Box Co. with cost, filed, (Smith) Notice Mailed.

Apr. 1. Notice of Appeal filed Mar. 31/48. Bond on Appeal filed Mar. 31, 48. Copy of Notice of Appeal forwarded to Edgar H. Rossbach, Esq., U. S. Atty. and to Clark, U. S. C. C. A.

Apr. 2. Statement of Points, filed 4/1/48. Designation of Contents of Record of Appeal filed 4/1/48.

May 4. Record of Appeal forwarded to the U. S. C. C. A.

3 *Stipulation of Facts*

Now come the plaintiff and defendant by their respective counsel and agree that the following facts may be taken as true with the

right reserved to either party to introduce additional facts not inconsistent with those contained herein:

I

Seeley Tube & Box Company is a corporation organized under the laws of the State of New Jersey with its principal place of business at West Clinton Street, Dover, New Jersey.

On July 7, 1943, the said Seeley Tube and Box Company was adjudged a bankrupt by the United States District Court for the District of New Jersey.

On July 7, 1943, William A. Dolan was appointed receiver in bankruptcy by the aforesaid Court and on that date qualified as such receiver and continued to act in that capacity until his appointment on September 29, 1943, as trustee in bankruptcy for said company.

On January 3, 1945, Seeley Tube & Box Company filed a petition in the United States District Court for the District of New Jersey under the provisions of Chapter XI of the Bankruptcy Act. On said date William A. Dolan was continued by the Court as trustee in pos-session of the assets of said Seeley Tube and Box Company, a debtor, in proceedings under said Chapter XI of the Bankruptcy Act.

An amended plan of arrangement proposed by Seeley Tube & Box Company in the aforesaid proceedings was confirmed and approved by order of the Court on June 4, 1945. By the terms of the aforesaid order the Seeley Tube & Box Company was revested with title of all of its assets of whatever nature, character and description.

4 II

The taxes involved in this action were paid to the defendant John E. Manning who at all times material to this action was the United States Collector of Internal Revenue for the Fifth District of New Jersey.

III

On December 15, 1941, plaintiff filed its corporate income, declared value excess-profits and defense tax return for its fiscal period beginning January 1, 1941, and ending September 30, 1941, with the defendant. The return disclosed net income for declared value excess-profits tax computation of $84,396.96 and normal tax net income of $56,882.55, and total income, declared value excess-profits and defense taxes due of $17,383.59, which taxes it paid to the defendant as follows: On December 15, 1941, $4,345.92; on March 16, 1942, $4,345.89; on June 17, 1942, $4,345.89, and on September 17, 1942, $4,345.89.

On December 15, 1941, plaintiff filed its excess-profits tax return for the fiscal period beginning January 1, 1941, and ending September 30, 1941, with the defendant. The return disclosed that the excess profits net income for said period was annuallized, $121,893.32, and that excess profits tax was due thereon of $27,514.41, which plaintiff paid to the defendant as follows: On December 15, 1941, $6,878.61; on March 16, 1942, $6,878.60; on June 17, 1942, $6,878.60 and on September 17, 1942, $6,878.60.

The taxes shown on the aforesaid returns were assessed by the Commissioner on January 12, 1942. A copy of the assessment list showing the assessments is attached hereto, made a part hereof and marked Exhibit "1."

IV

On August 2, 1943, after audit of plaintiff's tax returns set forth in paragraph III above, the Commissioner of Internal Revenue assessed against the Seeley Tube & Box Company for its fiscal period beginning January 1, 1941, and ending September 30, 1941, in accordance with existing Internal Revenue law applicable to bankruptcies and receiverships the following deficiencies:

Corporate income, declared value excess-profits and defense taxes in the sum of $11,494.31, together with interest thereon of $1,125.97, a total of $12,620.28.

Excess profits tax in the sum of $36,294.99, together with interest thereon of $3,555.42, a total of $39,850.41.

A copy of the assessment list showing the aforesaid assessments is attached hereto, made a part hereof and marked Exhibit "2".

V

Subsequently, on March 21, 1944, the Commissioner assessed deficiencies against plaintiff for the same period as follows:

Corporate income, declared value excess-profits and defense taxes in the sum of $418.43, together with interest thereon of $56.90, a total of $475.33.

Excess profits tax of $606.43 together with interest thereon of $82.66, a total of $689.09.

Copies of the assessment lists showing the aforesaid assessments are attached hereto, made a part here and marked Exhibits "3" and "4", respectively.

VI

On March 3, 1944, pursuant to an extension of time granted William A. Dolan, trustee, Seeley Tube & Box Company
6 in bankruptcy filed with the defendant corporate income and declared value excess-profits tax return for its fiscal year beginning October 1, 1942, and ending September 30, 1943, disclosing loss for said year in the sum of $231,514.

VII

Subsequently, said return for plaintiff's fiscal year beginning October 1, 1942, and ending September 30, 1943, was audited and as a result of said audit the Commissioner of Internal Revenue determined that plaintiff's net operating loss for said period was not more than $218,612.51 to which the taxpayer agreed.

The taxpayer, by its trustee in bankruptcy, William A. Dolan, on August 14, 1944, executed an "Acceptance of Proposed Overassessment" for its taxable period ended September 30, 1941.

A copy of said Acceptance of Proposed Overassessment is attached hereto, made a part hereof and marked Exhibit "5".

VIII

On May 17, 1944, the Commissioner abated, for reasons not pertinent to this action, corporate income, declared value excess-profits and defense taxes which he had heretofore assessed against the plaintiff for its tax period beginning January 1, 1941, and ending September 30, 1941, in the sum of $418.43, together with interest thereon in the sum of $56.90, a total abatement of $475.33.

IX

On March 15, 1944, William A. Dolan, trustee, Seeley Tube & Box Company, in bankruptcy, filed with the defendant a claim for refund of income, declared value excess-profits and de-
7 fense taxes with respect to its fiscal period, January 1, 1941, through September 30, 1941, in the sum of $17,383.59. A true copy of said claim is attached hereto, made a part hereof and marked Exhibit "6".

On March 15, 1944, the aforesaid William A. Dolan, trustee, filed a claim for refund of excess-profits tax with respect to plaintiff's tax period, January 1, 1941, through September 30, 1941, in the sum of $27,514.41. A copy of said claim is attached hereto, made a part hereof and marked Exhibit "7".

X

On December 7, 1944, the aforesaid William A. Dolan, trustee, filed a claim for refund of income, declared value excess-profits

and defense taxes with respect to plaintiff's fiscal period beginning January 1, 1941, and ending September 30, 1941, in the sum of $30,003.87.

On December 7, 1944 the aforesaid William A. Dolan, trustee, filed a claim for refund of excess profits tax for plaintiff's fiscal period beginning January 1, 1941, and ending September 30, 1941, in the sum of $68,053.91.

XI

On February 9, 1945, the Commissioner of Internal Revenue, pursuant to Public Decision No. 8229, approved February 3, 1945, issued to William A. Dolan, trustee in bankruptcy, Seeley Tube & Box Company, certificates of overassessment Nos. 2824943 and 2824944.

Copies of Public Decision No. 8229 and certificates of overassessment Nos. 2824943 and 2824944, respectively, are attached hereto, made a part hereof and marked Exhibits "8", "9", and "10".

8

XII

Pursuant to the public decision and the certificates of overassessment set forth in paragraph XI above, there was refunded to the plaintiff $40,384.66, which amount represented the taxes it had paid for its fiscal period beginning January 1, 1941, and ending September 30, 1941, less interest assessed on the assessed tax deficiencies, namely, $4,513.34, and the balance of the unpaid assessments were abated.

Dated: This 17th day of February, 1947.

HERBERT ELLEND,
ALBERT FREEMAN,
Of Counsel, Attorneys for the Plaintiff.
EDGAR H. ROSSBACH,
United States Attorney.
EDWARD V. RYAN,
Assistant United States Attorney,
Attorneys for the Defendant

(Exhibits "1", "2", "3", "4", "5", "6", "7", "8", "9", and "10" herein referred to are omitted from this appendix.)

9 *Findings of Fact and Conclusions of Law*

SMITH, District Judge:

This is a civil action for the recovery of $4,513.34, representing interest on certain deficiency taxes for the fiscal period beginning January 1, 1941 and ending September 30, 1941, which the plain-

tiff alleges were erroneously assessed and collected. The action is submitted to the Court on a stipulation of facts which we adopt as our finding of fact. It is necessary to repeat herein only the ultimate facts essential to the determination of the only question presented, which the parties concede is one of novel impression.

Facts

I

The plaintiff filed with the defendant its corporate income tax return for the fiscal period beginning January 1, 1941 and ending September 30, 1941. The reported tax liability in the amount of $17,383.59 was paid within time in four equal quarterly installments. The plaintiff also filed with the defendant its excess profits tax return for the same period. The reported tax liability of $27,514.41 was likewise paid within time in four equal quarterly installments. These taxes were assessed by the Commissioner of Internal Revenue on January 12, 1942.

II

Pursuant to the applicable provisions of the Internal Revenue Code, and particularly Section 274(a) of Title 26 U. S. C. A., the Commissioner of Internal Revenue, having determined a deficiency in each of the said taxes, assessed the following deficiency taxes: corporate income tax[1] in the sum of $11,494.31, together with interest thereon of $1,125.97, and excess profits tax in the sum of $36,294.99, together with interest thereon of $3,555.42. These deficiency taxes were assessed on August 2, 1943. There were additional deficiency taxes assessed on March 21, 1944. The amounts thereof are stated in paragraph V of the stipulation of facts. The deficiency taxes were not paid.

III

The plaintiff filed with the defendant its corporate income tax return for the fiscal period beginning October 1, 1942 and ending September 30, 1943. This return disclosed a net operating loss of $231,514.00 for the said period.[2] The said return was audited, and as a result thereof the Commissioner of Internal Revenue determined that the plaintiff's net operating loss for the said period was not more than $218,612.51. The plaintiff accepted this deter-

[1] The corporate income tax includes, in addition to the normal tax, the declared value excess profits tax and the defense tax.

[2] It should be noted that, an extension having been granted the plaintiff, the return was not filed until March 3, 1944.

mination and executed an "Acceptance of Proposed Overassessment" for the fiscal period beginning January 1, 1941 and ending September 30, 1941.

IV

The plaintiff filed with the defendant a claim for a refund in the sum of $17,383.99, the full sum of the corporate income tax paid for the fiscal year beginning January 1, 1941 and ending September 30, 1941. The plaintiff also filed with the defendant a claim for a refund in the sum of $27,514.41, the full sum of the excess profits tax paid for the same period. These claims for refund, filed on March 15, 1944, were predicated upon the asserted right to "a net operating loss carry-back" under Section 122 of the Internal Revenue Code of 1940, 26 U. S. C. A. 122.

11 The plaintiff filed amended claims for refund in which he asserted, in addition to his claim for taxes paid, a right to the abatement of his tax liability, including the interest assessed on the deficiency taxes.

V

The Commissioner of Internal Revenue recognized the right of the plaintiff to "a net operating loss carry-back" and determined an overassessment of income and excess profits taxes for the period in question, January 1, 1941 to September 30, 1941. (Decision No. 8229, approved February 3, 1945.—Exhibit 8). The Commissioner of Internal Revenue thereupon issued to the plaintiff two certificates of overassessment, in one of which (No. 2824944) he certified an overassessment of corporate income tax in the sum of $28,877.90 for the said period, and in the other of which (No. 2824943) he certified an overassessment of excess profits tax in the sum of $64,415.83 for the said period. The Commissioner of Internal Revenue refused to abate the interest assessed on the deficiency taxes.

VI

There was refunded to the plaintiff $40,384.66. This sum represented the corporate income and excess profits taxes actually paid for the period in question, January 1, 1941 to September 30, 1941, less $4,513.34, the interest assessed on the deficiency taxes for the same period, which were not paid. The balance of the unpaid assessments, comprised entirely of the deficiency taxes, were abated. The sum of $4,513.34, representing the unpaid interest on the deficiency taxes, was withheld by the defendant and applied to the payment of the said interest.

12 *Statutes*

The pertinent provisions of the Internal Revenue Code are stated in the appendix hereto annexed.

Discussion

It is conceded that the taxpayer paid the income and excess profits taxes reported in the respective returns for the fiscal year 1941 within time. There was, however, an additional obligation upon the taxpayer, the obligation to pay the deficiency taxes, together with interest thereon "from the date prescribed for the payment of the first installment" to the date the deficiency was assessed. Section 292. The taxpayer failed to meet this obligation.

The taxpayer contends that the application of Section 122(b) extinguished not only the entire tax liability for the fiscal year 1941 but also the liability for interest on the deficiency taxes. We cannot agree with this contention.

Section 23 allows as deductions from gross income, in addition to the other items therein enumerated, "the net operating loss deduction computed under section 122." These sections, and particularly 23(s) and 122 (a) and (b), when read together, allow as a deduction "a net operating loss carry-back"; the net operating loss sustained by a taxpayer in "any taxable year after December 31, 1941" is deductible from the gross income of the taxpayer for the two preceding taxable years. The application of these sections may extinguish the tax liability for the preceding taxable years, as it has here, but the application of these sections will not extinguish the liability for interest assessed on deficiency taxes.

The interest assessed under Section 292, although "collected as a part of the tax," is not a tax. *United States* v. *Childs*, 266 U. S. 304, 309; *Owens* v. *Commissioner of Internal Revenue*, 125 F. 2d 210, 213; *Penrose* v. *United States*, 18 F. Sup. 413, 415.

13 This interest is clearly intended to compensate the Government for the delay in the payment of taxes imposed by statute and assessed thereunder. Ibid.

It must be conceded that interest collected as a part of a tax must be refunded together with the tax upon determination that the tax was illegally assessed. There is no contention in the instant case that the deficiency taxes and the interest thereon were illegally assessed; they were legally assessed and were due upon notice and demand. The extinguishment of the tax liability for the fiscal year 1941 resulted, not from a determination that the taxes as assessed were illegal but from the application of Section 122(b). The application of this section abolished the right of the defendant to collect the deficiency taxes but not his right to collect the interest as compensation for the plaintiff's delay in their payment.

Conclusions

I

The liability of the plaintiff for the interest assessed on the deficiency taxes for the fiscal year 1941 was not extinguished upon the application of Section 122(b) of the Internal Revenue Code. The defendant lawfully applied the sum of $4,513.34 to the payment of the interest on the deficiency taxes for the said year. Judgment in favor of the defendant and against the plaintiff must, therefore, be entered.

II

Pursuant to Rule 58 of the Rules of Civil Procedure a judgment in favor of the defendant and against the plaintiff will be entered forthwith by the Clerk of the Court.

APPENDIX

§ 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(s) *Net Operating Loss Deductions.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U. S. C. 1940 ed., § 13.)

* * * * * *

§ 122. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of Carry-back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(26 U. S. C. 1940 ed., § 122.)

* * * * * *

§ 292. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, * * *.

(26 U. S. C. 1940, ed., § 292.)

16 *Judgment*

United States District Court, District of New Jersey

Office of the Clerk, Newark 1, N. J.

March 4th, 1948

SEELEY TUBE & BOX CO.

vs.

JOHN E. MANNING, Coll.

Docket No. Civil #6597

Notice is hereby given of the entry on March 4th, 1948 of a judgment in the above proceeding.

WILLIAM H. TALLYN,
Clerk.

17 *Designation of Contents of the Record on Appeal*

The plaintiff hereby designates the contents of the record on appeal as follows:

1. Docket Entries.
2. Complaint.
3. Answer.
4. Stipulation of Facts.
5. Findings of Fact and Conclusions of Law filed by Honorable William F. Smith.
6. Notice of Entry of Judgment dated March 4, 1948.
6A. Notice of Appeal.
7. This designation of the record.
8. Statement of Points.

BILDER, BILDER & KAUFMAN,
Attorneys for the Plaintiff.

ALBERT FREEMAN,
Of Counsel.

18 United States Court of Appeals for the Third Circuit

No. 9693

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY, APPELLANT

v.

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY

On Appeal from the United States District Court for the District of New Jersey

Present: Biggs, Chief Judge and Goodrich and O'Connell, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with directions to order judgment for the plaintiff.

For the Court,

HERBERT F. GOODRICH,
Circuit Judge.

Dec. 20, 1948.

Endorsements: Judgment Reversing Judgment of District Court, etc. Received & Filed Dec. 20, 1948. Ida O. Creskoff, Clerk.

United States Court of Appeals for the Third Circuit

No. 9693

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY, APPELLANT

v.

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY

On Appeal from the Judgment of the United States District Court for the District of New Jersey

Argued November 18, 1948

Before Biggs, Chief Judge, and Goodrich and O'Connell, Circuit Judges

Opinion of the Court

Filed December 20, 1948

By Goodrich, Circuit Judge.

This is a suit by a taxpayer to get back some money from the Government. The taxpayer was entitled to a refund for taxes paid in 1941.[3] It was repaid $40,384.66 and the Government kept back $4513.34 which it claimed as interest upon an alleged deficiency. The District Court denied relief to the taxpayer who, therefore, seeks help here.

The point of the case can best be understood if non-technically stated, leaving statutory references and the like for foot-
20 note elaboration. The taxpayer paid the tax it thought due for income and excess profits for 1941. Later deficiencies on both income and excess profits taxes were asserted by the Commissioner. Because the taxpayer had gone into bankruptcy the assessments were perfected in the accelerated fashion provided for in the statute.[4] Then in 1943 the taxpayer had a severe operating

[3] The taxpayer's fiscal period involved here is from January 1, 1941 to September 30, 1941. It filed its tax returns and paid taxes covering this period, and it is these payments to which the carry-back provisions are applicable.

[4] Internal Revenue Code § 274 provides:

"Sec. 274. BANKRUPTCY AND RECEIVERSHIPS—(a) Immediate Assessment.

"Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any

loss. By the terms of the statute there is a carry-back provision for the operating loss and the taxpayer is entitled to credit therefor back through 1941.[5] As a result of the application of the statutory rule the alleged deficiency in the taxpayer's 1941 tax dis-
21 appeared. Not only that, but the taxpayer became entitled to a refund on the amount it had paid for the same year. It is the difference between what it paid and what the Government paid it back that is the subject-matter of this suit.

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taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy or the appointment of the receiver."

[5] The applicable provision of the Internal Revenue Code reads as follows:

"Sec. 122. NET OPERATING LOSS DEDUCTION.

* * * * * *

"(b) Amount of Carry-Back and Carry-Over—(1) Net Operating Loss Carry-Back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net

It is argued on behalf of the Commissioner that the money was due when the deficiency was asserted.[8] The Government is, on this argument, entitled to interest on the difference between what the taxpayer paid and what the Government claimed until the debt due the Government was swept away by the application of the carry-back provisions of the statute already mentioned. The taxpayer, on the other hand, says that it does not owe interest for non-payment of deficiencies in taxes which, in the light of subsequent events, have been found not to exist.

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income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6) and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss."

[8] The applicable sections of the Revenue Act of 1938, §§ 271, 292, 52 Stat. 534, 541 (1938) provide:

"Sec. 271. DEFINITION OF DEFICIENCY.

"As used in this chapter in respect of a tax imposed by this title 'deficiency' means—

"(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

"(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax."

"Sec. 292. INTEREST ON DEFICIENCIES.

"Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is the earlier."

We think the argument here is overwhelmingly on the side of the taxpayer. It should be noted at the outset that the taxpayer is not claiming any interest from the United States. If it were, a different sort of problem would be presented and some of the rather elaborate argument made on behalf of the Commissioner would be in point.[7] All the taxpayer wants is to get back the money it paid the Government which is undisputedly coming to it because of the carry-back provisions. It asks, in other words, for the return of principal only.

22

Interest not contracted for by the terms of an agreement between parties is generally described as damages for the detention of money to which another is entitled.[8] The Government adopts that theory in this case. But what money was the Government entitled to here? As it turned out, taxpayer not only did not owe any money, but had money coming back to it. The only thing on which an interest claim could be predicated is the inchoate liability of the taxpayer which disappeared under the application of the carry-back provisions of the statute. We think that inchoate liability is not sufficient to call for the payment of anything but inchoate interest, whatever that may be, and so far as real money is concerned the taxpayer is entitled to get it back.

Both sides admit there is little decided case law that is very helpful. The taxpayer certainly has analogous authority in its favor in one line of cases. These decisions allowed the recovery

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[7] "It was only by reason of the permitted retrospective deduction for the taxable period . . . of the so-called 'net operating loss carry-back' from the later year, as provided by Section 122 (b) (1), that the taxpayer eventually became entitled to an abatement of the deficiency taxes. This, however, was after they had already been in existence for some considerable time, as already shown. Hence, the only amount the Commissioner was legally permitted to refund was the aggregate sum of the taxes paid, less the statutory interest on the deficiencies which had accrued between the due date of the payment of the taxes on December 15, 1941, and the date of the deficiency assessments on August 2, 1943 (Section 292 (a)), no interest being refundable except that which accrued after the refund claims were filed on March 15, 1944 (Section 3771 (e)). Consequently, the Commissioner had no alternative than to refuse to refund the interest in question. The exaction of interest from the Government requires specific statutory authority . . . and it may be computed only according to the statutory provisions in force at the time of the allowance of a refund or credit . . ." Brief for Appellee, pp. 13-14.

[8] 15 Am. Jur., Damages § 159 (1938); Restatement, Contracts § 337 (1932).

by the taxpayer against the Government of interest paid on a tax by the taxpayer in a situation where it developed that
23 the assessment was erroneous. The taxpayer was allowed to recover the interest he had paid in spite of a compromise agreement made with the Government at the time he paid the interest. Big Diamond Mills Co. v. United States, 51 F. 2d 721 (C. C. A. 8, 1931); Colorado Milling & Elevator Co. v. Howbert, 57 F. 2d 769 (C. C. A. 10, 1932); Phelps v. United States, 105 F. 2d 904 (C. C. A. 2, 1939). It also cites a previous ruling by the Commissioner which tends to support this point of view.[9]

The Commissioner relied heavily on Brandtjen & Kluge, Inc. v. United States, 78 F. Supp. 509 (D. C. Minn. 1948). This case is not exactly in point because a plaintiff was trying to get back interest and the court did not think that a refund of a tax included interest. But it is pretty close to the case before us, and the court there relied upon the instant case in the District Court for authority. The Minnesota court also pointed out that the plaintiff's argument was "appealing, forceful and persuasive of the lack of logic in the Bureau's refusal to return the interest . . . " 78 F. Supp. 509, 513.

After reviewing the authorities and reading the legislative history cited to us by each side we conclude to reverse. And the basis for that reversal, simply stated, is that the interest on nothing (what taxpayer owed the Government) is necessarily nothing. Therefore, the taxpayer is entitled to his money.

The judgment will be reversed with directions to order judgment for the plaintiff.

A true Copy:
Teste:

_____,
Clerk of the United States Court of Appeals for the Third Circuit.

24 I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, and proceedings in this Court in the case of Seeley Tube & Box Company vs. John E. Manning, Collector of Internal Revenue for the Fifth District of New Jersey, No. 9693, on file, and now remaining among the records of the said Court, in my office.

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[9] Referring to penalties and interest collected without authority, this ruling states ". . . that interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax." I. T. 1447, I-2 C. B. 220 (1922).

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 20th day of April in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the one hundred and seventy-third.

IDA O. CRESKOFF,
[SEAL] *Clerk of the U. S. Court of Appeals, Third Circuit.*

25 Supreme Court of the United States, October Term, 1948

No. —

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

vs.

SEELEY TUBE & BOX COMPANY

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,
It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 18th, 1949.

HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of March, 1949.

26 In the Supreme Court of the United States, October Term, 1948

No. —

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

v.

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY

Stipulation

Subject to the approval of this Honorable Court, it is hereby stipulated and agreed by and between the attorneys for the parties in the above-entitled cause that, for the purpose of the

petition for a writ of certiorari, the printed record may consist of the following:

1. The appendix to the brief for the appellant in the United States Court of Appeals for the Third Circuit.

2. The proceedings before the United States Court of Appeals for the Third Circuit.

It is further stipulated and agreed that the petitioner will file the entire transcript of the record now on file in the office of the Clerk of the United States Court of Appeals for the Third Circuit with the Clerk of the United States Supreme Court, and that in the event the petition for a writ of certiorari is granted the printed record shall consist of the proceedings in the court below and such portions of the entire transcript of the record certified by the Clerk of the United States Court of Appeals for the Third
27 Circuit as the respective parties may designate. It is further agreed that either party may, in the petition and briefs, refer to any portions of the typewritten transcript of record which is not included in the printed record filed with this Court.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

April 19, 1949.

BILDER, BILDER & KAUFMAN,
Attorneys for Appellant.

April 20, 1949.

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Supreme Court of the United States

Order allowing certiorari

Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.